IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 22-789

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DANNY WEBB CONSTRUCTION CO. INC.
and DANNY WEBB

Petitioners, Defendants below,

v.

NORTH HILLS GROUP, INC.

Respondent, Plaintiff below.

PETITIONERS' REPLY BRIEF

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INTRODUCTION

The Circuit Court should never have sent the claims in this case to a jury. But when the Circuit Court did so, Petitioner-Defendants tried the case and won anyway. But that didn't stop Respondent-Plaintiff—or the Circuit Court, who summarily threw out the verdict and ordered a new trial with no meaningful analysis, and in the face of sufficient evidence to support the jury's decision. Now on appeal, Petitioners' brief dutifully explains how the record supports the jury's verdict, which this Court must now reinstate.

In response, Plaintiff North Hills largely continues to focus *only* on the evidence that supports the outcome with which they agree—while ignoring the evidence that doesn't, hoping that this Court, like the Circuit Court, will side with them. But that approach is inconsistent with the longstanding legal standard. In keeping with our State's constitutional right to trial by jury in civil cases, *see* W. Va. Const. art. III, § 13, an order tossing a jury verdict "*will be reversed* . . . where it appears the case, as a whole, was fairly tried and no error prejudicial to the losing party was committed during the trial." Syl. Pt. 3, *Neely v. Belk Inc.*, 222 W. Va. 560, 562–63, 668 S.E.2d 189, 191–92 (2008) (emphasis added). Indeed, as Petitioners have explained, the evidence was more-than-sufficient to support a finding in the defendants' favor. The Circuit Court therefore abused its discretion by summarily usurping the jury's decision. Accordingly, this Court should reverse the Circuit Court's order and reinstate the jury's verdict.

ARGUMENT

I. Sufficient evidence supported the jury's verdict.

As Petitioners explained in their opening brief, insufficiency of the evidence was the only reason given below for vacating the jury's verdict. Yet the Circuit Court made no actual assessment of the evidence, instead resting on a recitation of the losing party's evidence as justification. The Circuit Court did not event attempt to apply the settled principles laid down by this Court for evaluating sufficiency of the evidence. See *Fredeking v. Tyler*, 224 W. Va. 1, 6, 680 S.E.2d 16, 21 (2009).

In this case, injury to property is an element common to each of North Hills's claims. Defendants point to several admissions elicited from North Hills' own witnesses, supporting the finding that North Hills suffered no actual injury to property. Even before Webb Construction are afforded the benefit of inference, each admission is independently sufficient to sustain the jury's verdict in the defendants' favor. In each instance, however, North Hills' response brief either ignores or obfuscates that critical testimony.

First, Terry Urban, an inspector for DEP, testified that DEP would have intervened if the pipeline actually posed any risk to the environment or public health. App. 266. Urban expressed no concerns about the integrity of Well 508 or the pipeline, stating that "it's good pipe." *Id*. at 266-67, 275. Based on this testimony, the jury could have reasonably concluded that North Hills suffered no injury to property and that remediation was unnecessary. But like the Circuit Court, North Hills' brief ignores this testimony.

Second, Urban's testimony allowed a jury to infer that North Hills's claims were wholly manufactured. In particular, North Hills claimed that it discovered a pipe leak in January 2018. App. 22. The jury, however, learned that this supposed pipe leak occurred more than a year after production had ceased and Defendants had been ejected from the property. App. 228, 1722-35. Urban, who responded to the scene, testified that (1) there was never a leak, (2) the media had been tipped off in advance, and (3) the substance on the ground was planted by someone else. App. 269-74. Based on this testimony, the jury could have reasonably concluded that North Hills suffered no injury to property and that its claims were simply a sham. Again, like the Circuit Court, North Hills ignores this testimony.

Third, Marc Glass, North Hills's environmental sciences and remediation expert, conceded that he found "no constituents that exceed health-based standards." App. 511-12. And because there was no exceedance of health-based standards, North Hills is left simply *asserting* that "that the synergistic effects on known health risks necessitated remediation of the property." Resp. 9-10. But this misstates Glass's testimony. Glass testified only that "the *potential* for synergistic effects exists"—itself an unremarkable statement. App. 489-90 (emphasis added). Indeed, because he is not a toxicologist, Glass conceded that he could *not* actually identify or quantify any such synergistic effects in this case.[1] *See id*. And because

[1] "Synergistic effect," as described by Glass, is "when two forces combine to create a different effect than what would've occurred with either one acting alone." App. 488-89. Put another way, this concept describes the interaction of two or more constituents when their combined effect is greater than the sum of the individual effects standing alone.

Glass could not identify any *actual* health risks posed by the constituents—alone or in combination—North Hills is left with a new standard of supposed harm: "reason to be concerned." App. 490 (testifying that there was "reason to be concerned," though he could not identify or quantify any actual "synergistic" effects). The jury could have reasonably concluded that such concerns—even if genuine (a dubious proposition in itself)—were insufficient to prove injury to property or to necessitate the sweeping remediation efforts proposed by North Hills.

Fourth, because it could not prove actual injury to property, North Hills tried to *insinuate* general wrongdoing—a theme that persists on appeal. For instance, at trial and on appeal, North Hills claims that "[Webb Construction] injected an unknown amount of substances from unknown sources into [Well 508]." Resp. 16. This simply isn't true, as the record demonstrates. Webb testified that he kept records of how many barrels were injected and where that wastewater came from. App. 176-77. North Hills does not otherwise suggest that Defendants exceeded the scope of their DEP permit. Even if he no longer possessed those records, they were nevertheless furnished to DEP every month and remain publicly available.[2] App. 176-77. North Hills then suggests that "any such records probably were destroyed." *Id*. (citing App. 190). The snippet of testimony cited in North Hills' brief does not support any such conclusion. North Hills also ignores the fact that Webb sold his company in May 2018, meaning he no longer had access to those records. App. 120-

[2] Monthly injection volumes, for example, are available at https://apps.dep.wv.gov/oog/UICInjectionVolumeSearch/UICInjectionSearch.cfm

21. Even accepting as true that the defendants injected unknown volumes from unknown sources, North Hills fails to explain *how* that actually bears on the issue of injury. Ultimately, the jury saw through North Hills' meaningless insinuations and unsupported scare tactics. This Court should, too.

What is more, North Hills twice asserts that its evidence "was not contradicted by or rebutted by" the defendants, Resp. 16, but this (again) simply ignores critical admissions by North Hills' *own witnesses*. It also assumes that testimony can only be rebutted through the defendants' own witnesses or exhibits, which is plainly not the case. If the jury's verdict was so plainly wrong—as North Hills argues—then it should have little trouble explaining how. But, beyond reciting its list of various witnesses and exhibits, North Hills wholly fails to identify any specific evidence that *compels* throwing out a verdict in the defendants' favor. The verdict is not only *reasonable* in light of the record evidence—the only standard that need be met here to reverse—it is demonstrably correct on its own terms.

For these reasons and those set forth in Petitioners' opening brief, the Circuit Court's unsupported and unreasoned decision to throw out the jury's verdict must be reversed.

II. The Circuit Court erred in granting a new trial because each of North Hills' claims fail as a matter of law.

Alternatively, even if this Court finds that no reasonable jury could have found in the defendants' favor based on the record, it should still reverse and remand for entry of judgment in favor of the defendants. As explained in the opening brief, the Circuit Court was wrong to grant a new trial because North Hills'

claims fail as matter of law for numerous, independently sufficient reasons. North Hills' response brief fails misses the mark on each.

A. All claims are precluded by res judicata.

Because this dispute was litigated to its conclusion in *Webb v. N. Hills Grp., Inc.*, No. 16-0640, 2017 WL 2493768 (W. Va. June 9, 2017) ("*North Hills I*"), North Hills' claims are barred by res judicata. Res judicata requires (1) final adjudication on the merits in the prior action; (2) symmetry of parties in both actions; and (3) symmetry of claims in both actions or presentation of claims that could have been resolved, had they been presented, in the prior action. *See Blake v. Charleston Area Med. Ctr., Inc.*, 201 W. Va. 469, 477, 498 S.E.2d 41, 49 (1997). North Hills contests each element, but they cannot succeed in avoiding res judicata.

First, though it concedes that *North Hills I* resulted in a final adjudication on the merits, North Hills suggests that its current claims were not included in that final adjudication. Resp. 18. But North Hills misunderstands the "prior final adjudication" element, which speaks to the finality of the prior *case*—not specific *claims*. *See Bison Ints., LLC v. Antero Res. Corp.*, 244 W. Va. 391, 398, 854 S.E.2d 211, 218 (2020) ("Otherwise, matters that were not raised, yet 'could have been resolved' would never give rise to res judicata."). Thus, the proper question is whether there was a prior action which received a final adjudication on the merits. *See id.* The answer here is, unquestionably, yes.

Second, though it concedes that both cases involved the same parties, North Hills still concludes that Webb Construction cannot satisfy the second element of res judicata. Resp. 19. But North Hills does not explain why. In both cases, North

Hills was the plaintiff. *Compare* App. 17 *with* App. 1712. And in both cases, Danny Webb and Webb Construction were defendants. *Id*. There can be no genuine dispute that the second element is satisfied.

Third, res judicata precludes both (1) claims that are identical to those in the prior action, and (2) claims that could have been resolved—had they been presented—in the prior action. Syl. Pt. 4, *Blake*, 201 W. Va. 469. North Hills addresses the former category of claims—while completely ignoring the latter category of claims, which are the only types of claims at issue here. Resp. 19-20. In *North Hills I*, North Hills sought declaratory and injunctive relief against the defendants. App. 1712-21.

In particular, North Hills sought to terminate the lease and eject Defendants from the property because they were operating an injection well contrary to the terms of the lease. Ultimately, North Hills got exactly what it asked for: the lease was terminated, and the defendants were ejected from the property. *See Webb*, 2017 WL 2493768. Even though it had threated such damages before filing *North Hills I*, App. 670-71, North Hills did not request remediation or any other compensatory damages in that prior action, App. 1712-35.

In its response, North Hills does not explain this decision—a telling omission. Nor does it provide any reason why compensatory damages could not have been requested in the prior action. That North Hills already litigated this dispute to final judgment squarely bars it from *reopening* this matter for the purpose of seeking additional relief that was clearly available to be requested in *North Hills I*. Because

North Hills' present claims are barred as a matter of law based on res judicata, the Circuit Court erred by permitting a new trial on them.

B. All claims are precluded by the statute of limitations.

North Hills claims that the applicable two-year limitations period is tolled by the discovery rule. But this Court already determined that North Hills had inquiry notice beginning in November 2014. *See Webb,* 2017 WL 2493768, at *3 ("the record is also abundantly clear that North Hills Group had no knowledge that anything other than salt water or brine was being injected into the 508/1A well until learning information at a Fayette County Commission meeting in November 2014, which prompted an inquiry into the nature of Webb Construction operations on the premises."). North Hills' president, Patti Hamilton, reaffirmed this timeline at trial in this case. App. 328-30, 340. That same testimony requires an identical result here. North Hills does not refute—much less, discuss—this timeline. And if that weren't enough, there are at least four other events that served to trigger the running of the two-year limitations period—each of which North Hills ignores on response.

In July 2015, North Hills terminated the lease with Webb Construction, citing the injection of off-site waste material other than salt water, brine, or natural gas. App. 670-71. In September 2015, North Hills wrote DEP, claiming that Webb Construction had been running a "wastewater operation" and was therefore obliged to clean up the site and remove the pipeline—the very claims North Hills is now prosecuting. App. 669. In January 2016, North Hills filed it complaint in *North Hills I*, alleging that Webb Construction contaminated the property with "elevated

levels of several dissolved constituents including chloride, bromide, sodium, manganese, strontium and barium." App. 1715. In June 2016, Judge Blake terminated the lease, referring to the property as a "hydraulic fracturing waste dump," which resulted in "potential contamination migration onto the properties of nearby landowners and adjacent streams of water." App. 1733. Based on these events, North Hills had actual knowledge of its claims as early as April 2015 and as late as June 2016. North Hills, however, did not file its complaint in this case until January 2019—well beyond the two-year limitations period. North Hills conspicuously fails to respond to any of these four events, each of which are independently sufficient to trigger the running of the statute of limitations. Rather than address these earlier events, North Hills attempts to anchor a triggering event to two different milestones within the two-year limitations period. Neither is persuasive.

First, North Hills suggests that its claims were tolled until entry of this Court's September 6, 2017 Mandate in *North Hills I*. Only then, North Hills argues, could it have appreciated that it had "any cognizable claims" against Webb Construction. Resp. 22. That the legal viability of North Hills' claims remained uncertain on appeal does not serve to toll the limitations period. *See* Syl. Pt. 4, *Dunn v. Rockwell*, 225 W. Va. 43, 46, 689 S.E.2d 255, 258 (2009) ("The plaintiff is charged with knowledge of the factual, rather than the legal, basis for the action.").

Second, North Hills claims that Defendants hid their injection activities from North Hills and, as a result, North Hills did not learn of the "actual condition" of

the property until "approximately 2019." But the statute of limitations began to run when North Hills knew something was supposedly wrong, not when it learned the full extent of the supposed injury. *See Goodwin v. Bayer Corp.*, 218 W.Va. 215, 624 S.E.2d 562, 568 (2005) (providing that the statute of limitations begins to run when plaintiff knows something is wrong, not when they discovery the full extent of that wrong).

North Hills plainly had the opportunity to litigate these claims in *North Hills I* but, for whatever reason, it decided not to do so. Its attempt to reopen that case for the purposes of seeking monetary damages is therefore (also) barred by the statute of limitations. So, even if the weight of the trial evidence warranted tossing the jury verdict, a new trial is error on all claims as a matter of law.

C. The unjust enrichment claim is precluded by a written agreement.

North Hills ticks through the elements of unjust enrichment, but at no point does it address the threshold issue of whether it can maintain such a claim in light of an express agreement relating to the same subject matter. The answer is no. *See Gulfport Energy Corp. v. Harbert Priv. Equity Partners, LP*, 244 W. Va. 154, 159–60, 851 S.E.2d 817, 822–23 (2020) (providing that an express contract and an implied contract relating to the same subject matter cannot co-exist). Because the Lease eclipses any right to recover for unjust enrichment, North Hills's unjust enrichment claim fails as a matter of law and the Circuit Court erred by ordering a new trial on that claim.

D. The breach of fiduciary duty claim fails for lack of duty.

Although North Hills states that a "fiduciary duty arises when a person assumes a duty to act for another's benefit, while subordinating his or her own personal interest to that other person," Resp. 28, at no point does North Hills explain where the defendants assumed the "highest standard of duty implied by law." *Napier v. Compton*, 210 W. Va. 594, 598, 558 S.E.2d 593, 597 (2001). Nor could it.

Defendants did not assume such a duty by entering onto North Hills's property. And, if such a duty was assumed under the Oil and Gas Lease, North Hills's claim would be barred by the gist of the action doctrine.[3] Even then, the suggestion that Webb Construction was supposed to act only for North Hills' benefit is entirely antithetical to the very purpose of lease, which was the product of arms-length negotiation and executed for the mutual benefit of the parties. The rule urged by North Hills—which would impose a fiduciary relationship between counterparties to every oil and gas lease—carries unimaginable consequences and would upend the relationship between operators and landowners throughout the state.

Because North Hills' breach of fiduciary duty claim necessarily fails for want of a fiduciary duty, the Circuit Court erred by ordering a new trial on that claim.

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[3] *See Hirtle Callaghan Holdings, Inc. v. Thompson*, 2022 WL 2048656, at *4 (E.D. Pa. June 7, 2022) (dismissing breach of fiduciary duty claims based on the gist of the action doctrine where the duties outlined in the contract are "inextricably intertwined" with the alleged breaches of fiduciary duties).

CONCLUSION

North Hills' brief offers no persuasive defense of the Circuit Court's flawed decision to throw out the verdict reached by the jury. Accordingly, this Court should reverse the Circuit Court's order and reinstate the jury verdict. *See* Syl. Pt. 2, *Neely*, 222 W. Va. at 562, 668 S.E.2d at 191 (quoting Syl. Pt. 4, *Bronson v. Riffe*, 148 W. Va. 362, 135 S.E.2d 244 (1964)) (holding that when reversing a new trial order the Supreme Court of Appeals must itself reinstate the jury verdict and judgment rendered thereon).

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CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2023, **Petitioners' Reply Brief** was filed and served via File&ServeXpress on all counsel of record.

/s/ J. Zak Ritchie
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